

Comment Summary and Responses
Malibu Creek Bacteria TMDL
Prepared for December 13, 2004 Regional Board Hearing

1. County of Los Angeles, Department of Public Works (LACDPW)
2. Heal the Bay-(HTB)

No.	Author	Date	Comment	Response
1-1	LACDPW	11/1/04	There is a lack of evidence to suggest that OWTs are, failing at significant rates and thus contributing to bacterial contamination of surface water and groundwater resources.	Section 4 of the January 29, 2004 TMDL staff report details the evidence that supports staff's finding that OWTs are contributing to bacterial contamination of surface water and groundwater resources.
1-2	LACDPW	11/1/04	The modeling data relied upon by staff in determining the waste load allocations for OWTs could not be validated by in-stream monitoring data. January 29, 2004 Staff Report, p.19.	As stated on page 24 of the TMDL staff report, the source loads should be considered estimates, due to the lack of model validation. The model was used primarily to make an estimate of existing loading and load reductions to meet the water quality objectives for bacteria. In this TMDL, the model was not relied upon to determine waste load allocations (WLAs) for OWTs. The WLAs are expressed in terms of allowable days of exceedance of the bacteria water quality objectives.
1-3	LACDPW	11/1/04	The MOU does not require the County to regulate OWTs under the	According to the MOU, the County is

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			<p>Proposed TMDL or to accept responsibility for “compliance with load allocations” in the Proposed TMDL for OWTSs in the unincorporated areas of the County.</p>	<p>responsible for the permitting of residential OWTS. The County is therefore responsible for ensuring compliance with the load allocations assigned to residential OWTS. Section V.1 of the MOU states that the County will act as the enforcing agencies for compliance with applicable State standards for new and existing County-regulated OWTSs. Once the TMDL is adopted by the Regional and State Boards and approved by USEPA and the Office of Administrative Law, it becomes a State law, and is therefore enforceable under the MOU.</p> <p>Furthermore, section V.1 of the MOU requires the County to take corrective measures to cease potential surface or groundwater degradation by failing OWTS, paying special attention to 303(d) listed water bodies. The proposed TMDL finds that OWTS are contributing to bacterial contamination in the Malibu Creek watershed. Once the TMDL is effective, this would certainly qualify as an area of potential degradation and the County would be required to take corrective measures to cease the contribution by residential OWTS to the degradation. Were the County to ignore the finding of a TMDL in</p>

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				determining an area of potential degradation, it would be contradicting a publicly noticed and peer reviewed document, approved by the Regional and State Boards, USEPA and the Office of Administrative Law.
1-4	LACDPW	11/1/04	The OWTSs and, indeed, most of the Malibu Creek watershed, are not part of the County’s flood control system, provisions of the TMDL relating to OWTSs cannot be enforced through the municipal separate storm sewer system NPDES permit (“MS4 Permit”).	Provisions of the TMDL relating to OWTS will be enforced under the interim measures in section V of the MOU.
1-5	LACDPW	11/1/04	The County believes that the specific OWTS requirements in the Proposed TMDL appears to violate Water Code § 13360. Pursuant to this statute, a Regional Board may not specify the “design, location, type of construction, or particular manner in which compliance may be had” with a waste discharge requirement (“WDR”) or “other order of a regional board of the state board.” While the TMDL is not a WDR and is being enacted as a non-enforceable amendment of the Basin Plan (see Resolution, paragraph 4), the TMDL must ultimately be enforced through some permit or order, such as the MS4 permit (which is a WDR) or other orders (see Resolution, paragraph 19). Thus, the Regional Board cannot specify how any party will comply with the TMDL, including the activities listed on pages 10-12 of Attachment A, lest it violate Water Code § 13360.	The implementation actions on page 10-12, Table 7-10.3 of Attachment A to Resolution No.2004-019R provides guidance and direction to dischargers for identifying "high-risk" areas. The TMDL does not specify the "design, location, type of construction, or particular manner in which compliance may be had.”
1-6	LACDPW	11/1/04	The Proposed TMDL short-circuits the AB 885 process by requiring local agencies to establish criteria to determine which OWTS may qualify as “high-risk” and to require such systems to undertake “system upgrades as necessary to demonstrate compliance with applicable effluent limits and/or receiving water objectives.”	The proposed TMDL is consistent with the approach taken by the draft AB 885 regulations. The current draft AB 885 regulations require all existing systems adjacent to 303(d) listed water bodies to be

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			Attachment A, p.12.	upgraded or replaced to meet performance requirements for bacteria, nitrogen, TSS and BOD by January 1, 2009. <i>(note: they are effluent limits: Total Nitrogen=20mg/L, Total coliform = 2.2 MPN)</i> . The draft regulations define a specific horizontal setback (600 feet) or allow for a groundwater monitoring report to identify those OWTS that are contributing to the impairment. Please also note that the draft AB 885 regulations allow the Regional Board to impose more protective requirements to protect water quality. In the event there are significant inconsistencies between the forthcoming AB885 regulations and the TMDL, the Regional Board has the ability to revise the TMDL through a Basin Plan amendment to address the inconsistencies.
1-7	LACDPW	11/1/04	The County recommends that the requirements contained in those pages regarding the identification of “high-risk” OWTSs be deleted from the Proposed TMDL.	In the absence of finalized AB885 regulations, the Regional Board staff does not support removing the requirement for identifying "high risk" areas.
1-8	LACDPW	11/1/04	“Local agencies regulating on-site wastewater treatment systems” are under no legal obligation to provide a monitoring report. While the Proposed TMDL cites Water Code § 13267 as authority for the monitoring plan (Attachment A, pp.8, 10), and possibly for the report	Section II of the MOU designates the County as the qualified local agency to regulate OWTSs, and Water Code § 13225 gives the Regional Board the authority to

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			<p>on rationale and criteria for “high-risk” OWTSS, this statute does not support such a citation.</p>	<p>request a monitoring plan, and a report on rationale and criteria for “high-risk” OWTSS from property owners. Although the County is not considered the discharger for all the County-regulated OWTSS, it does have an obligation under Section V of the MOU to determine the whether the "potential for ground or surface water degradation exist due to the existence of failing County-regulated OWTSS" and order the dischargers to initiate corrective action.</p> <p>Regional Board staff neglected to cite its authority under Water Code § 13225 to require monitoring. The TMDL and Basin Plan amendment documents will be revised to include a citation of Water Code § 13225 which gives the Regional Board the authority to "require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom."</p>

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1-9	LACDPW	11/1/04	With respect to the requirement for bacteria water quality monitoring, again, Water Code § 13267 applies to “dischargers” The County Flood Control District, as operator of those sections of the flood control system that are located in the Malibu Creek watershed, would be responsible for bacteria monitoring in that system. This obligation does not, however, extend to natural watercourses or non-County owned point sources.	There are instances where the County's flood control system discharges to natural watercourses. For example, the County has a storm drain system that discharges into lower Las Virgenes Creek. This discharge to Las Virgenes Creek eventually discharges to the ocean via a natural watercourse, Malibu Creek and lagoon. The County is considered a discharge into each stream segments that its discharge flows, whether the discharge or not the discharge originated in the reach. Therefore, the County under Water Code § 13267 and § 13225 is obligated to provide monitoring data and reports outlined in the TMDL.
1-10	LACDPW	11/1/04	If it adopted this requirement, the Regional Board would appear to be extending the reach of the TMDL to non-listed waterbodies, in violation of law. The Clean Water Act is clear that, with the exception of an “informational” TMDL (which is not the case here), a TMDL is to be established only for those waters that have been identified on a Section 303(d) list.	This TMDL addresses listed waterbodies only. However allocations are assigned to waterbodies upstream from listed waterbodies, that contribute to downstream impairments.
1-11	LACDPW	11/1/04	The County regulates OWTs through the issuance of building permits and, under the recently adopted MOU, will issue operating permits to certain alternative systems in the unincorporated areas of the County, including in the Malibu Creek watershed. As we noted above, however, the MOU does not require the County to undertake any implementation of the Proposed TMDL or any other requirement other than those contained in the County Code or as may ultimately	See response to comment 1-3.

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			be promulgated pursuant to AB 885.	
1-12	LACDPW	11/1/04	<p>The Regional Board lacks authority to require such monitoring. Moreover, the County lacks the resources and personnel to conduct the monitoring. The watershed monitoring performed by Public Works is of the flood control system, which is owned and operated by the County Flood Control District. The type of monitoring called for in the proposed TMDL does not involve the flood control system, but rather discharges from individual OWTSS owned by third parties.</p>	See response to comment 1-8
1-13	LACDPW	11/1/04	<p>There may be legal impediments to surface water monitoring even if the County chose to conduct such monitoring. Under California law, for waterbodies that are “navigable,” the streambed (but not adjacent private property) is owned by the State under the “public trust” doctrine. However, waterbodies that are “non-navigable” are considered to be owned, to the middle of the streambed, by the adjacent landowners. An agency does not have the authority to conduct monitoring where it would be trespassing.</p>	<p>The Regional Board acknowledges that there may be locations where monitoring cannot be conducted safely or legally. The logistics of monitoring can be addressed in the design of the monitoring program.</p>
1-14	LACDPW	11/1/04	<p>There are practical limitations to the effectiveness of surface water monitoring for bacteria. For example, such monitoring for total coliform or fecal coliform, while it will confirm the presence of such bacteria, cannot distinguish between anthropogenic and non-anthropogenic sources. If the difference between upstream and downstream concentrations is subtle, it may be impossible to determine whether the sources of the additional bacteria are from OWTSS or another sources.</p>	<p>The details and specifics of the implementation monitoring indicators will be described in the monitoring plan, which is subject to the Executive Officer's approval. Surface water monitoring is suggested as a screening mechanism for identifying high-risk areas, and is expected to be less costly than groundwater monitoring. If bacteria levels are statistically higher downstream, then additional studies may be warranted to</p>

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				identify the specific sources of bacteria, whether it is anthropogenic or non-anthropogenic.
1-15	LACDPW	11/1/04	The requirement for a demonstration of no-impact from OWTS in the Proposed TMDL is impermissibly vague and ambiguous. A “successful demonstration” is stated to be one that shows “no statistically significant increase in bacteria levels in the downstream location(s).” Attachment A, p.11.	See response to comment 1-14
1-16	LACDPW	11/1/04	The groundwater monitoring provision is vague and ambiguous. There is no indication as to what monitoring result would determine that the OWTS was, in fact, a “high-risk” system.	See response to comment 1-14. To provide more detailed requirements would be overly prescriptive. The TMDL provides an opportunity to develop a monitoring plan taking into account site-specific conditions.
1-17	LACDPW	11/1/04	Also, as we commented with respect to surface water monitoring, the provision does not indicate whether monitoring must be continued indefinitely or may be discontinued after some period of time. The Proposed TMDL is also vague in its apparent distinction between “high-risk” and “contributing” areas no guidance is provided as to the distinction between the treatment of OWTSs in these two types of areas.	See response to comment 1-14
1-18	LACDPW	11/1/04	The proposed TMDL is additionally ambiguous in that it does not indicate how the owner of an individual OWTS in a “high-risk area” would be able to show that it is not contributing to a bacteria impairment. It appears to suggest that even if an individual OWTS may not be contributing to the impairment, if that system is located in a “high-risk area,” it is subject to “system upgrades.” Attachment A, p. 12.	See response to comment 1-14. The TMDL provides an opportunity for individuals to demonstrate that their systems are not contributing to the impairment, and should therefore not be subject to system upgrade requirements. Alternatively, the County could provide a service to its residents by

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				performing regional studies in high-risk areas. Regional studies potentially would be more cost effective. This is consistent with draft AB 885 regulations, which exempt individual OWTS from performance requirements if a groundwater report prepared by a California registered professional engineer or geologist demonstrates that an individual OWTS is not contributing to the impairment.
1-19	LACDPW	11/1/04	This provision, which would allow responsible agencies to use a “risk assessment approach” using “hydrogeologic modeling,” also raises the same concerns as the surface water and groundwater monitoring options, including lack of authority, resources and high cost. Moreover, use of a hydrogeologic model would require an extensive investigation into such issues as the location of existing OWTSs, regional hydrology, groundwater aquifer conductivity, geology, lithology and other factors. And, while the Proposed TMDL requires a report within a year after the effective date of the TMDL, the Staff Report itself acknowledges that a risk assessment similar to the Malibu study “may take in excess of one year to complete.” Staff Report, p.8.	Regional Board staff acknowledges that some studies may take in excess of one year to complete. But some jurisdictions, such as the City of Malibu, may have information available that would allow them to develop determine high-risk areas. The Regional Board can consider the request for a time extension of up to 6 years for those jurisdictions that demonstrate the need.
1-20	LACDPW	11/1/04	With respect to the 10-foot separation from “historical groundwater, “ this requirement is overly prescriptive and does not gibe with the most recent analyses of the appropriate margin between OWTSs and groundwater. As the January 29 Staff Report itself noted, U.S. EPA, in its “Onsite Wastewater Treatment Systems Manual, “ found that in normal operation, there was retention and die-off “of most, if not	Alternative 1 allows owners of OWTS that are located in high-risk areas to provide the Regional Board with a demonstration that the OWTS is not impacting surface waters in the watershed.

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			all, observed pathogenic bacterial indicators with 2 to 3 feet... of the infiltrative surface.: Final Staff Report, p.37. While the County does not dispute that the soil type must be appropriate, arbitrarily requiring 10 feet of separation from “historical groundwater” levels, without regard to the distance of the system from any 303(d) listed waterway, the type of soil underlying the system or what constitutes “historical groundwater” levels, is arbitrary and capricious.	
1-21	LACDPW	11/1/04	The requirement for a 250-foot setback from a listed 303(d) waterbody also fails to account for the type and depth of soil underlying the individual OWTS as well as the likelihood for hydraulic continuity between the discharge from the system and the waterbody in question.	See response to comment 1-20.
1-22	LACDPW	11/1/04	The designation of systems as “high-risk” if they are located “in areas of documented nitrate or human bacterial problems in the surface or groundwater” is vague, ambiguous and overreaching. Groundwater per se is not an issue in TMDLs, which are intended to achieve surface water beneficial uses. While bacteria or nitrate contaminated groundwater may be a health concern, that does not mean that the groundwater will necessarily contaminate 303(d) listed surface waters.	Recent studies conducted by the City of Malibu and the Las Virgenes Municipal Water District have clearly demonstrated the impact that contaminated groundwater can have in surface water.
1-23	LACDPW	11/1/04	The “point of discharge” is not clearly defined. If that means the point at which wastewater enters the leach field, the requirement is overly prescriptive, as it would not take into account the filtering aspect of the soil matrix. Also, existing technology cannot uniformly achieve the bacterial objectives.	See response to comment 1-18.

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1-24	LACDPW	11/1/04	<p>The County has particular concern regarding the monitoring program required to exempt a resident from designation as the operator of a “high-risk” OWTS. To gain such an exemption, the homeowner would be required to embark on a program of groundwater monitoring or weekly surface water monitoring. Based upon our review of the proposed general WDRs for single-family residential OWTSs, the groundwater monitoring program would require the homeowner to site and install a nest of monitoring wells, sample them quarterly, measure groundwater levels, have those samples analyzed in a state certified laboratory using EPA test procedures, maintain extensive records, and prepare and submit quarterly groundwater monitoring reports and an annual report, all under the direction of a California Registered Geologist, Certified Engineering Geologist or Registered Civil Engineer with appropriate experience in hydrogeology.</p>	See response to comment 1-18.
1-25	LACDPW	11/1/04	<p>The County further objects to the requirement that OWTSs located within 100 feet of non-listed waterbodies would be subject to the proposed TMDL high-risk” criteria. When this alternative first was suggested in the April 16 version of the Proposed TMDL, staff indicated that it was recommending that the setback criterion be applied to all waterbodies “because many waterbodies in the watershed have not been adequately monitored for bacteria. Local agencies are encouraged to monitor to confirm impairment before requiring system upgrades.</p>	See response to comment 1-18.
1-26	LACDPW	11/1/04	<p>The County objects to this alternative, which would insert the minimum prescriptive criteria for “high-risk” OWTSs found in the recently passed General WDR for residential OWTSs. The County</p>	Comment Noted.

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			previously has provided extensive comments on the WDRs, which reflected its strong opposition to the rigid three-tier characterization of OWTSs, a characterization that ignored the facts of individual OWTSs, as well as the lockstep and prescriptive requirements for owners of those OWTSs based on the characterization. Rather than repeat those comments here, we have attached as Exhibits A and B the written comments on the draft WDR submitted by the County on May 20, 2004 and August 27, 2004, which are hereby incorporated into these comments as though fully set forth herein.	
2-1	HTB	11/12/04	Conducting special studies will require much longer than the 1-year time period currently allotted for high risk OWTS identification in the TMDL, resulting in lengthy delays in mitigation efforts.	See response to comment 1-14 and 1-19.
2-2	HTB	11/12/04	The proposed language in Alternative #2 runs contrary to the reason for including identification of high-risk systems in the TMDL which was to ensure optimal and timely mitigation of those OWTS that are most likely contributing to water quality impairment, and to avoid years of further study using limited resources that could be used for pollution mitigation.	The purpose of Alternative #2 was to allow for a more thorough assessment of high-risk areas to ensure with a level of confidence that OWTS that pose the greatest risk are given the highest priority for mitigation. This is not contrary to ensuring and timely mitigation of OWTS located in high-risk areas.
2-3	HTB	11/12/04	<p>We recommend that the Regional Board adopt Alternative #4 in the staff report with modification:</p> <ol style="list-style-type: none"> 1. Adopt prescriptive criteria for identification of high-risk OWTS that is consistent with the criteria in the tentative general WDR for residential OWTS, which in turn, is based on the proposed 	Comments noted.

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			<p>State Board's OWTS (AB-885) draft regulation.</p> <ol style="list-style-type: none"> 2. Allow for special studies in areas where there is overriding evidence, as demonstrated to the Regional Board by the local jurisdiction, that the OWTS in these areas do not contribute to water quality impairment. 3. Require special studies for areas not identified by the prescriptive criteria as high risk when there is evidence that systems in these areas may contribute to water quality impairment. 4. Require application of the prescriptive criteria (or special studies per the above requirements) in areas adjacent to tributaries that may be contributing to the water quality impairment. 	
2-4	HTB	11/12/04	<p>The staff proposes replacing language regarding installation of disinfection systems to high risk OWTS with the following:</p> <p style="padding-left: 40px;">“...OWTS located in high-risk areas are subject to upgrades as necessary to demonstrate compliance with applicable effluent limits and/or receiving water quality objectives.”</p> <p>We recommend adding the following to the aforementioned language:</p> <p style="padding-left: 40px;">“Installation of disinfection systems will be deemed functionally equivalent to compliance with applicable effluent limits and/or receiving water quality objectives. A site-specific subsurface monitoring program must be implemented to demonstrate compliance if disinfection is not employed.”</p>	<p>The recommended language specifies the means by which compliance can be achieved. Water Code Section 13360 does not allow the Regional Board to specify the means of compliance.</p>